

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEE DEVORE,

Defendant-Appellant.

UNPUBLISHED

February 1, 2005

No. 250073

Calhoun Circuit Court

LC No. 02-004403-FC

Before: Meter, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, first-degree home invasion, MCL 750.110a(2), and two counts of assault or assault and battery, MCL 750.81. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court abused its discretion when it denied defendant's motion for a mistrial after the prospective jurors in his case witnessed the taking of a verdict in another case. We disagree. We review a trial court's decision to deny a motion for a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). The grant or denial of a motion for mistrial is within the sound discretion of the trial court, and absent a showing of prejudice, reversal is not warranted. Prejudice is shown when the trial court's ruling is so grossly in error as to deprive the defendant of a fair trial or amount to a miscarriage of justice. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999).

Defendant has not met his burden of showing that the jurors were exposed to an extrinsic influence that tainted the jury and affected his due process rights, under the standard articulated in *People v Budzyn*, 456 Mich 77; 566 NW2d 229 (1997). In *Budzyn*, our Supreme Court explained the procedure for evaluating a claim of extrinsic influence on the jury:

In order to establish that the extrinsic influence was error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the

extrinsic material and the adverse verdict. If the defendant establishes this initial burden, the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt. We examine the error to determine if it is harmless beyond a reasonable doubt because the error is constitutional in nature. The people may do so by proving that either the extraneous evidence was duplicative of evidence produced at trial or the evidence of guilt was overwhelming. [*Id.* at 88-90 (Citations omitted).]

The jurors' exposure to another jury's verdict cannot be considered an extraneous influence that would adversely affect defendant's case. The jury had not yet been sworn, and defendant's trial had not yet begun. Having heard no evidence in defendant's case, it is difficult to conclude that the jury could take anything from the witnessed verdict and apply it to the present case. Even if it was an extraneous influence, there is no relation to a material aspect of defendant's case, and no direct connection between the jury's exposure and its verdict in defendant's case. The witnessed verdict was for a case that was tried by a different prosecutor, and the defendant in that case was charged with different crimes.

Defendant also argues that because defendant's jurors "observed first-hand that another panel of citizens evaluated the performance of the prosecutor and concluded that the prosecutor had met the state's burden of proof on at least some of the charges," there is a real and substantial possibility that defendant's jury was influenced to do the same. The argument that defendant's jury could be tainted because the State prevailed on some of the charges is flawed because it could be construed as meaning that any juror that has witnessed a verdict in another case, or had prior service on a jury, was also subject to an extraneous influence. In the present case, there were jurors with prior jury service, and jurors that had sat through jury selection on the previous day. There are no facts or circumstances demonstrating that the witnessed verdict was unusual in any way, and it is unclear on these facts how viewing the justice system at work could taint defendant's jury such that its impartiality was destroyed.

Each potential juror was questioned on his or her ability to remain fair and impartial. The jurors understood that the defendant is presumed innocent. Further, each juror swore to make his or her decision based only on the evidence presented at trial and pursuant to the court's instructions. Defendant presented no evidence that the witnessed verdict had an extraneous influence on the jury, and there is no indication that the jurors did anything besides deliver their verdict in the required manner. Defendant's due process right to a fair and impartial jury was not violated, and the trial court did not abuse its discretion when the trial court denied defendant's motion for a mistrial. *Budzyn, supra*.

Affirmed.

/s/ Patrick M. Meter

/s/ Kurtis T. Wilder

/s/ Bill Schuette